

PATENT*Docket No.: PD-201008A***IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In Re Application of

Erin H. Sibley

**RECEIVED
CENTRAL FAX CENTER****NOV 15 2005**

Serial No. 09/844,923

Art Unit: 2617

Filed: April 26, 2001

Examiner: Ustaris, Joseph G.

For: **DIGITAL OVER-THE-AIR COMMUNICATION SYSTEM FOR USE WITH
DIGITAL TERRESTRIAL BROADCASTING SYSTEM****CERTIFICATE OF MAILING/TRANSMISSION (37 C.F.R. § 1.8(a))**

I hereby certify that this correspondence is, on the date shown below, being transmitted by facsimile to (571) 273-8300 (Centralized Facsimile Number), addressed to Mail Stop Appeal Brief - Patents, P. O. Box 1450, Alexandria VA 22313-1450.


SignatureDate: November 15, 2005Georgann S. Grunebach, Reg. No. 33,179**BRIEF ON APPEAL**

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Sir:

The following Appeal Brief is submitted pursuant to the Notice of Appeal dated
September 20, 2005 for the above-identified application.

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U.S.S.N. 09/844,923

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I. Real Party in Interest

The real party in interest in this matter is The DirecTV Group, Inc., of El Segundo, California which is 34 percent owned by Fox Entertainment Group, which is approximately 82 percent owned by The News Corporation, Limited.

II. Related Appeals and Interferences

There are no other known appeals or interferences which will directly affect or be directly affected by or have bearing on the Board's decision in the pending appeal.

III. Status of the Claims

Claims 1-12 stand rejected in the Final Office Action. Claims 13-17 stand withdrawn.

IV. Status of Amendments

Appellant has filed an Amendment After Final.

V. Summary of Claimed Subject Matter

The present invention is best illustrated generally in Figure 1 and more specifically, in Figure 11. Claim 1 is directed to a system 10 of broadcasting digital channels over an allocated frequency spectrum. Claim 1 recites a satellite 14, a network operations center 12 uplinking electronic content to the satellite, and a terrestrial over-the-air digital broadcast center 16 receiving the electronic content from the satellite 14 and generating a digital channel signal over at least a portion 172 of the allocated

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frequency spectrum. The above is described in paragraphs 30-32(Fig 1) with respect to the general structure, paragraphs 57 and 58 (Fig. 11) and Figure 10 with respect to the spectrum portions (paragraph 56). The terrestrial over-the-air digital broadcast center generates digital over-the-air electronic content over a second portion 174 of the allocated frequency spectrum 170. In Claim 1 the over-the-air digital broadcast center is a terrestrial system.

Claim 2 recites that the over-the-air broadcast center is coupled to a stratospheric platform. A stratospheric platform is described in paragraph 33.

Claim 3 recites that the over-the-air center is coupled to a cell tower. The cell tower is also described in paragraph 33, line 2.

Claim 4 recites that the over-the-air broadcast center is coupled to a TV broadcast tower. The TV tower is set forth in line 3 of paragraph 33. It should be noted that a generic wireless transmitter 60 is illustrated in Figure 1 to represent each of the recitations of Claims 2, 3 and 4.

Claim 5 recites that the electronic content comprises digital audio signals. Audio signals are specifically mentioned in paragraph 48. Also, audio signals are mentioned in paragraph 68 as well.

In Claim 6, the electronic content is described as video. As mentioned also in paragraph 68, video and audio outputs may be provided. Thus, video and audio signals are provided.

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Claim 7 recites that the user appliance is fixed. Figure 1 shows various types of receiver equipment with respect to users 18. This is described in paragraph 34. These devices may be mobile devices such as a personal computer 64 or a mobile device such as laptop computer 66.

Claim 8 recites that the user appliance is mobile. The support for this is found in paragraph 34 as described above with respect to Claim 7.

Claim 9 recites method steps that are set forth in paragraph 58. The steps include uplinking a plurality of electronic content packages to a satellite, receiving the electronic content packages from the satellite, over-the-air broadcasting of the electronic content packages within excess bandwidth of a digital television broadcast signal from a terrestrial over-the-air broadcast center and receiving electronic content packages through a user appliance (lines 5-7). Thus, Claim 9 is similar to Claim 1 in that electronic content packages are provided within the excess bandwidth of a digital television broadcast signal. The digital television broadcast signal is provided from a terrestrial over-the-air broadcast center.

Claim 10 recites that the over-the-air broadcasting system is performed from a stratospheric platform. This is similar to that set forth in Claim 2 recited above.

Claim 11 recites that the over-the-air broadcasting is from a cell tower. Support for this is similar to Claim 3 set forth above.

Claim 12 recites that the over-the-air broadcasting is performed from a TV broadcast tower. This is similar to Claim 4 set forth above.

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VI. Grounds of Rejection to be Reviewed on Appeal

The following issues are presented in this appeal:

Whether Claims 1-7 and 9-12 stand rejected under 35 U.S.C. §103(a) as unpatentable over *Hendricks* (6,160,989) in view of *Beckmann* (6,675,388).

Whether Claim 8 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Hendricks* in view of *Beckmann* in further view of *Owa* (6,711,397).

VII. Argument**The Rejection of Claims 1-7 and 9-12 under 35 U.S.C. §103(a)****Claim 1**

The *Hendricks* reference is directed to a network controller for cable television delivery systems. The *Hendricks* reference specifically mentions that the teachings may be applied to “home telephone lines, cellular networks, fiberoptics, Personal Communication Networks and similar technology for transmitting to the home” as set forth in Col. 7, lines 30-34. Applicant agrees that both a digital and analog tuners are illustrated as elements 3 and 5 of Fig. 2. Applicant agrees that an operations center satellite and a network controller are illustrated. However, as the Examiner sets forth, no second portion of the allocated frequency spectrum of an analog broadcast signal is taught in the *Hendricks* reference. The *Hendricks* reference also does not suggest a second portion of allocated frequency spectrum of an analog broadcast signal that is transmitted together with the digital channel over the first portion of the allocated frequency spectrum.

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On page 6 of the Final Office Action, the Examiner states that the *Hendricks* reference discloses “a cable headend that resides on earth and transmits signals to the users that resides on the earth (See *Hendricks* Fig. 1) or terrestrial over-the-air broadcast center.” Appellant respectfully submits that the over-the-air broadcast center is missing in Figure 1. A concatenated cable system 210 is clearly shown leading from the network controller to the set top terminals. This is not an over-the-air broadcast center since the signals are provided within the cable system.

The *Beckmann* reference is set forth for a system that utilizes the vertical blanking interval of an analog broadcast system to deliver various data. Applicant agrees that the vertical blanking interval in *Beckmann* is used for various data. Also, as set forth in Col. 5, lines 29-30, the data may be streaming video or audio. The *Beckmann* reference has the signal delivered from an input cable 2 as illustrated in Fig. 2. Both a digital TV channel tuner 3 and an analog TV tuner 5 are illustrated in Fig. 2. The signals may also be delivered directly from the satellite to the set top box 16 which are then coupled to the tuner 18 and the tuner 19. No teaching is provided for a terrestrial-based over-the-air broadcast center.

The Examiner states, “it would have been obvious to one with ordinary skill in the art at the time the invention was made to modify the cable headend disclosed by *Hendricks* to be able to transmit some of the data or ‘electronic content’ within the VBI of an ‘analog broadcast signal’, as taught by *Beckmann*, in order to efficiently use the bandwidth available between the headend and user terminals thereby increasing the

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efficiency of the overall system.” First, Appellant has amended the claims to remove the words “vertical blanking interval” with the second portion of allocated frequency spectrum. Appellant respectfully also submits that the Examiner is forming a hindsight reconstruction of the present invention using the teachings of the prior art.

It is improper, in determining whether a person of ordinary skill in the art would have been led to this combination of references, simply to “[use] that which the inventor taught against the teacher.” W. L. Gore v. Garlock Inc., 721 F. 2d 1540, 1553, 220 USPQ 301312-13 (Fed. Cir. 1983). “Obviousness may not be established using hindsight or in view of the teachings or suggestions of the inventor.” Para-Ordnance Mfg. V. SGS Importers Int'l, 73 F. 3d at 1087, 37 USPQ2d at 1239, citing W. L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d at 1551, 1553, 220 USPQ at 311, 312-13. Clearly, no support, motivation or incentive is provided by the two cited references for such a combination. It is well-established that the prior art must make a suggestion of, or provide an incentive for a claimed combination of elements to establish a *prima facie* case of obviousness. See In re Oetiker, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992); Ex parte Clapp, 227 U.S.P.Q. 972, 973 (Bd. Pt. App. 1985). In this instance, however, no support, motivation or incentive is provided by the two cited references for the combination proposed by the Examiner. The *Hendricks* reference is clearly used as a generic communication system. Only conventional broadcasting without extra content is set forth.

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Claims 2 and 10

Claims 2 and 10 recite that the over-the-air broadcasting is performed from a stratospheric platform. Neither the *Hendricks* nor the *Beckmann* reference teaches a stratospheric platform.

Claims 3 and 11

Claims 3 and 11 recite that the over-the-air broadcasting is performed from a cell tower. The Examiner cites Col. 7, lines 29-34, for a cell tower. No specific teaching is provided for a cell tower, although a cellular network is mentioned in Col. 7.

Claims 4 and 12

Claims 4 and 12 recite the over-the-air broadcasting is performed from a TV broadcast tower. The Examiner cites Col. 7, lines 29-34 for a broadcast tower as being similar and interchangeable with a cellular network. Appellant respectfully submits that no teaching or suggestion is provided for the broadcast tower in the *Hendricks* reference. Therefore, Appellant respectfully requests the Board to reverse the Examiner's position with respect to Claims 4 and 12.

Claims 5 and 6

Claims 5 and 6 are directed to digital and video signals. Admittedly, the *Hendricks* reference discloses both audio and video programs. However, no teaching or suggestion is provided for the combination set forth with respect to Claim 1 in either the *Hendricks* reference or the *Beckmann* reference as set forth above.

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Claim 7

Claim 7 recites that the user appliance is fixed. A set top box as set forth by the Examiner is fixed. However, neither the *Hendricks* nor the *Beckmann* reference teach or suggest the combination of Claim 7 and Claim 1.

Claim 9

Claim 9 is similar to Claim 1 in method form. Claims 2-7 and 10-12 are dependent upon independent claims 1 and 9. Appellant respectfully believes that these claims are also allowable for the same reasons set forth above.

The Rejection of Claim 8 under 35 U.S.C. §103(a)**Claim 8**

The *Owa* reference is set forth for teaching a mobile receiving terminal. Although a mobile receiving terminal is illustrated, no teaching or suggestion is provided in the *Owa* reference for the elements missing from the combination of the *Hendricks* and *Beckmann* references. Appellant therefore respectfully requests the Board to reverse the Examiner's position with respect to this rejection as well.

VIII. Claims Appendix

A copy of each of the claims involved in this appeal, namely Claims 1-12 is attached as a Claims Appendix.

IX. Evidence Appendix

None.

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X. Related Proceedings


None.

XI. Conclusion

For the foregoing reasons, Appellants respectfully request that the Board direct the Examiner in charge of this examination to withdraw the rejections.

Please charge the amount of \$500.00 required in the filing of this appeal to Deposit Account No. 50-0383 of The DirecTV Group, Inc. The Commissioner is hereby authorized to charge any additional fees which may be required, or credit any overpayment to that account. This form is being submitted in duplicate.

Respectfully submitted,



Georgann S. Grunebach
Registration No. 33,179
Attorney for Appellant

Date: November 15, 2005

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CLAIMS APPENDIX

1. A system of broadcasting digitally channels over an allocated frequency spectrum comprising:

a satellite;

a network operations center uplinking electronic content to said satellite;

a terrestrial over-the-air digital broadcast center receiving said electronic content from said satellite and generating a digital channel signal over at least a first portion of said allocated frequency spectrum and generating digital over-the-air electronic content over a second portion of said allocated frequency spectrum; and

a user appliance receiving said electronic content.

2. A system as recited in claim 1 wherein said over-the-air broadcast center is coupled to a stratospheric platform.

3. A system as recited in claim 1 wherein said over-the-air broadcast center is coupled to a cell tower.

4. A system as recited in claim 1 wherein said over-the-air broadcast center is coupled to a TV broadcast tower.

5. A system as recited in claim 1 wherein said electronic content comprises digital audio signals.

6. A system as recited in claim 1 wherein said electronic content comprises video.

7. A system as recited in claim 1 wherein said user appliance is fixed.

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8. A system as recited in claim 1 wherein said user appliance is mobile.
9. A method of distributing electronic content comprising the steps of:
uplinking a plurality of electronic content packages to a satellite;
receiving the electronic content packages from the satellite;
over-the-air broadcasting the electronic content packages within excess
bandwidth of a digital television broadcast signal from a terrestrial over-the-air broadcast
center; and
receiving the electronic content packages through a user appliance.
10. A method as recited in claim 9 wherein the step of receiving over-
the-air broadcasting comprises over-the-air broadcasting from a stratospheric platform.
11. A method as recited in claim 9 wherein the step of receiving over-
the-air broadcasting comprises over-the-air broadcasting from a cell tower.
12. A method as recited in claim 9 wherein the step of receiving over-
the-air broadcasting comprises over-the-air broadcasting from a TV broadcast tower.

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Claim 2 recites that the over-the-air broadcast center is coupled to a stratospheric platform. A stratospheric platform is described in paragraph 33.

Claim 3 recites that the over-the-air center is coupled to a cell tower. The cell tower is also described in paragraph 33, line 2.

Claim 4 recites that the over-the-air broadcast center is coupled to a TV broadcast tower. The TV tower is set forth in line 3 of paragraph 33. It should be noted that a generic wireless transmitter 60 is illustrated in Figure 1 to represent each of the recitations of Claims 2, 3 and 4.

Claim 5 recites that the electronic content comprises digital audio signals. Audio signals are specifically mentioned in paragraph 48. Also, audio signals are mentioned in paragraph 68 as well.

In Claim 6, the electronic content is described as video. As mentioned also in paragraph 68, video and audio outputs may be provided. Thus, video and audio signals are provided.

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Claim 7 recites that the user appliance is fixed. Figure 1 shows various types of receiver equipment with respect to users 18. This is described in paragraph 34. These devices may be mobile devices such as a personal computer 64 or a mobile device such as laptop computer 66.

Claim 8 recites that the user appliance is mobile. The support for this is found in paragraph 34 as described above with respect to Claim 7.

Claim 9 recites method steps that are set forth in paragraph 58. The steps include uplinking a plurality of electronic content packages to a satellite, receiving the electronic content packages from the satellite, over-the-air broadcasting of the electronic content packages within excess bandwidth of a digital television broadcast signal from a terrestrial over-the-air broadcast center and receiving electronic content packages through a user appliance (lines 5-7). Thus, Claim 9 is similar to Claim 1 in that electronic content packages are provided within the excess bandwidth of a digital television broadcast signal. The digital television broadcast signal is provided from a terrestrial over-the-air broadcast center.

Claim 10 recites that the over-the-air broadcasting system is performed from a stratospheric platform. This is similar to that set forth in Claim 2 recited above.

Claim 11 recites that the over-the-air broadcasting is from a cell tower. Support for this is similar to Claim 3 set forth above.

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Whether Claims 1-7 and 9-12 stand rejected under 35 U.S.C. §103(a) as unpatentable over *Hendricks* (6,160,989) in view of *Beckmann* (6,675,388).

Whether Claim 8 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Hendricks* in view of *Beckmann* in further view of *Owa* (6,711,397).

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The *Beckmann* reference is set forth for a system that utilizes the vertical blanking interval of an analog broadcast system to deliver various data. Applicant agrees that the vertical blanking interval in *Beckmann* is used for various data. Also, as set forth in Col. 5, lines 29-30, the data may be streaming video or audio. The *Beckmann* reference has the signal delivered from an input cable 2 as illustrated in Fig. 2. Both a digital TV channel tuner 3 and an analog TV tuner 5 are illustrated in Fig. 2. The signals may also be delivered directly from the satellite to the set top box 16 which are then coupled to the tuner 18 and the tuner 19. No teaching is provided for a terrestrial-based over-the-air broadcast center.

The Examiner states, “it would have been obvious to one with ordinary skill in the art at the time the invention was made to modify the cable headend disclosed by *Hendricks* to be able to transmit some of the data or ‘electronic content’ within the VBI of an ‘analog broadcast signal’, as taught by *Beckmann*, in order to efficiently use the bandwidth available between the headend and user terminals thereby increasing the

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efficiency of the overall system.” First, Appellant has amended the claims to remove the words “vertical blanking interval” with the second portion of allocated frequency spectrum. Appellant respectfully also submits that the Examiner is forming a hindsight reconstruction of the present invention using the teachings of the prior art.

It is improper, in determining whether a person of ordinary skill in the art would have been led to this combination of references, simply to “[use] that which the inventor taught against the teacher.” W. L. Gore v. Garlock Inc., 721 F. 2d 1540, 1553, 220 USPQ 301312-13 (Fed. Cir. 1983). “Obviousness may not be established using hindsight or in view of the teachings or suggestions of the inventor.” Para-Ordnance Mfg. V. SGS Importers Int'l, 73 F. 3d at 1087, 37 USPQ2d at 1239, citing W. L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d at 1551, 1553, 220 USPQ at 311, 312-13. Clearly, no support, motivation or incentive is provided by the two cited references for such a combination. It is well-established that the prior art must make a suggestion of, or provide an incentive for a claimed combination of elements to establish a *prima facie* case of obviousness. See In re Oetiker, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992); Ex parte Clapp, 227 U.S.P.Q. 972, 973 (Bd. Pt. App. 1985). In this instance, however, no support, motivation or incentive is provided by the two cited references for the combination proposed by the Examiner. The *Hendricks* reference is clearly used as a generic communication system. Only conventional broadcasting without extra content is set forth.

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Claims 2 and 10

Claims 2 and 10 recite that the over-the-air broadcasting is performed from a stratospheric platform. Neither the *Hendricks* nor the *Beckmann* reference teaches a stratospheric platform.

Claims 3 and 11

Claims 3 and 11 recite that the over-the-air broadcasting is performed from a cell tower. The Examiner cites Col. 7, lines 29-34, for a cell tower. No specific teaching is provided for a cell tower, although a cellular network is mentioned in Col. 7.

Claims 4 and 12

Claims 4 and 12 recite the over-the-air broadcasting is performed from a TV broadcast tower. The Examiner cites Col. 7, lines 29-34 for a broadcast tower as being similar and interchangeable with a cellular network. Appellant respectfully submits that no teaching or suggestion is provided for the broadcast tower in the *Hendricks* reference. Therefore, Appellant respectfully requests the Board to reverse the Examiner's position with respect to Claims 4 and 12.

Claims 5 and 6

Claims 5 and 6 are directed to digital and video signals. Admittedly, the *Hendricks* reference discloses both audio and video programs. However, no teaching or suggestion is provided for the combination set forth with respect to Claim 1 in either the *Hendricks* reference or the *Beckmann* reference as set forth above.

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Claim 7

Claim 7 recites that the user appliance is fixed. A set top box as set forth by the Examiner is fixed. However, neither the *Hendricks* nor the *Beckmann* reference teach or suggest the combination of Claim 7 and Claim 1.

Claim 9

Claim 9 is similar to Claim 1 in method form. Claims 2-7 and 10-12 are dependent upon independent claims 1 and 9. Appellant respectfully believes that these claims are also allowable for the same reasons set forth above.

The Rejection of Claim 8 under 35 U.S.C. §103(a)**Claim 8**

The *Owa* reference is set forth for teaching a mobile receiving terminal. Although a mobile receiving terminal is illustrated, no teaching or suggestion is provided in the *Owa* reference for the elements missing from the combination of the *Hendricks* and *Beckmann* references. Appellant therefore respectfully requests the Board to reverse the Examiner's position with respect to this rejection as well.

VIII. Claims Appendix

A copy of each of the claims involved in this appeal, namely Claims 1-12 is attached as a Claims Appendix.

IX. Evidence Appendix

None.

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X. Related Proceedings

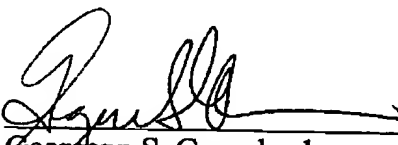
None.

XI. Conclusion

For the foregoing reasons, Appellants respectfully request that the Board direct the Examiner in charge of this examination to withdraw the rejections.

Please charge the amount of \$500.00 required in the filing of this appeal to Deposit Account No. 50-0383 of The DirecTV Group, Inc. The Commissioner is hereby authorized to charge any additional fees which may be required, or credit any overpayment to that account. This form is being submitted in duplicate.

Respectfully submitted,



Georgann S. Grunebach
Registration No. 33,179
Attorney for Appellant

Date: November 15, 2005

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CLAIMS APPENDIX

1. A system of broadcasting digitally channels over an allocated frequency spectrum comprising:
 - a satellite;
 - a network operations center uplinking electronic content to said satellite;
 - a terrestrial over-the-air digital broadcast center receiving said electronic content from said satellite and generating a digital channel signal over at least a first portion of said allocated frequency spectrum and generating digital over-the-air electronic content over a second portion of said allocated frequency spectrum; and
 - a user appliance receiving said electronic content.
2. A system as recited in claim 1 wherein said over-the-air broadcast center is coupled to a stratospheric platform.
3. A system as recited in claim 1 wherein said over-the-air broadcast center is coupled to a cell tower.
4. A system as recited in claim 1 wherein said over-the-air broadcast center is coupled to a TV broadcast tower.
5. A system as recited in claim 1 wherein said electronic content comprises digital audio signals.
6. A system as recited in claim 1 wherein said electronic content comprises video.
7. A system as recited in claim 1 wherein said user appliance is fixed.

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8. A system as recited in claim 1 wherein said user appliance is mobile.
9. A method of distributing electronic content comprising the steps of:
uplinking a plurality of electronic content packages to a satellite;
receiving the electronic content packages from the satellite;
over-the-air broadcasting the electronic content packages within excess bandwidth of a digital television broadcast signal from a terrestrial over-the-air broadcast center; and
receiving the electronic content packages through a user appliance.
10. A method as recited in claim 9 wherein the step of receiving over-the-air broadcasting comprises over-the-air broadcasting from a stratospheric platform.
11. A method as recited in claim 9 wherein the step of receiving over-the-air broadcasting comprises over-the-air broadcasting from a cell tower.
12. A method as recited in claim 9 wherein the step of receiving over-the-air broadcasting comprises over-the-air broadcasting from a TV broadcast tower.